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MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-880

BRENDA BRUSH,

Petitioner,

vs.

SAN FRANCISCO NEWSPAPER PRINTING COMPANY,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit

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Petitioner, BRENDA BRUSH, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 19, 1972.

OPINION

The opinion of the Court of Appeals for the Ninth Circuit, not yet reported, appears in Appendix A hereto. The opinion of the District Court is reported at 315 F.Supp. 577, and appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 19, 1972, and this Petition

for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a newspaper or other publisher of classified advertisements listing employment opportunities and jobs desired and providing incidental customer services is an "employment agency" within the meaning of Section 701(c) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e(c)), thereby subject to the anti-discrimination provisions of Title VII of the Act?

STATUTORY PROVISIONS INVOLVED

Section 701(c) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(c), provides as follows:

> "The term 'employment agency' means any person regularly undertaking within or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance."

Section 703(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(b), provides as follows:

> "It shall be an unawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin."

Section 704(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(b), provides as follows:

> "It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment."

STATEMENT OF THE CASE

Petitioner seeks certiorari to review a decision of the Ninth Circuit Court of Appeals, which affirmed a judgment of the United States District Court for the Northern District of California denying a motion for a preliminary injunction and dismissing Petitioner's complaint under Title VII of the Civil Rights Act of 1964. (R.153-165).

The complaint charged that Respondent, the printer and publisher of the classified advertising section of the two major San Francisco newspapers (the *Chronicle* and the *Examiner*), violated the provisions of Title VII by publishing "Jobs Wanted" and "Help Wanted" listings in the classified sections under separate "male" and "female" headings in circumstances in which sex is not a "bona fide occupational qualification reasonably necessary to the normal operation of a business or enterprise." (R.2-3). Accordingly, the complaint alleged, Respondent was engaged in an unlawful employment practice in violation of Section 703(b) of the Civil Rights Act of 1964 (42 U.S.C.

§ 2000e-2), which caused Petitioner irreparable injury by depriving her of equal access to employment. (R.3).[1]

The record before the District Court included Petitioner's Affidavit in which she stated that she had experienced difficulty in obtaining suitable employment because of her sex, that she had consulted the classified advertising sections of the *Chronicle* and *Examiner* during the month of November 1969, and that she had there found many jobs listed under the heading "Help Wanted, Men," effectively discouraging her from making application. (R.57-58). Petitioner thereafter sought to place a classified advertisement with Respondent in a "Job Wanted" listing which did not have a heading designating the sex of the job seeker, but found that no such listing was available.[2] (R.58). She was advised by an employee of Respondent that she might list under *both* "Jobs Wanted, Men" and "Jobs Wanted, Women", but she declined to do so and did not place any advertisement. (R.58).[3]

The record also includes the Affidavit of an expert in the employment field (R.61-62) who examined the "Help Wanted" advertisements in the *Chronicle* and *Examiner* in the month of November 1969 to determine whether sex was a bona fide occupational qualification for the jobs listed. She concluded, based upon her familiarity with the diction-

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1. The District Court concluded that Petitioner had complied with the statutory prerequisite of suit in presenting her claims to the Equal Employment Opportunity Commission. (R.157, n.3).

2. Respondent subsequently stipulated that a sexually neutral "Job Wanted" category will be made available without acknowledging any duty to do so. (R.155).

3. The record includes a remarkably candid admission of Respondent that it realized substantial additional revenues from the insertion of duplicate advertisements under both male and female headings. (R.145).

ary of occupational titles published by the Department of Labor, that ninety-two per cent (92%) of the advertisements under the "Help Wanted, Women" section did *not* require sex as a bona fide occupational qualification, and that ninety per cent (90%) of the advertisements in the "Help Wanted, Men" section did not involve such a requirement. (R.62).

Although the Commission (reversing its earlier stand to the contrary) contended in a brief *amicus curiae* filed with the District Court that a newspaper is an "employment agency" within the meaning of Section 701(c) of Title VII (42 U.S.C. § 2000e(c)) and therefore subject to the anti-discrimination provisions of Title VII (R.70-130), the District Court on June 12, 1970 ruled to the contrary and dismissed the complaint for failure to state a claim. (R.153-165). In the Court of Appeals, the Commission again urged, as *amicus curiae*, that newspapers are bound by the anti-discrimination provisions of the Act.[4] However, the Court of Appeals affirmed the District Court in a short *per curiam* opinion expressing agreement with the reasoning of the lower court.[5]

Reasons for Granting the Writ

INTRODUCTION

The decision of the Court of Appeals that newspapers do not fall within the definition of "employment agency" within the meaning of Section 701(c) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(c), opens a crippling gap in the otherwise sweeping ban on discrimination in em-

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4. Briefs *amicus curiae* supporting Petitioner were also filed by the Women's Equity Action League and by the NAACP Legal Defense and Educational Fund, Inc.

5. Respondent expressly disclaimed in the Court of Appeals any reliance upon the First Amendment. *Compare Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, cert. granted December 4, 1972, No. 72-419.

ployment imposed by Congress with the passage of Title VII. The effect of the decision below is that newspapers are *not* bound by the anti-discrimination provisions of Title VII in conducting the business of publishing employment advertisements and may therefore knowingly participate in—and profit from—the process of discrimination in employment on the basis of race, color, religion, sex or national origin by the deliberate publication of advertisements containing such limitations; indeed, as in the present case, they may explicitly segregate positions listed as available under the separate headings "Help Wanted, Men" and "Help Wanted, Women".

Moreover, the decision of the Court of Appeals is demonstrably incorrect. It so completely jeopardizes the effective enforcement of the Act that this Court's intervention is compelled. In sum, the Court of Appeals has incorrectly decided a question of federal law of profound importance which has not been, but should be, settled by this Court. (Supreme Court Rule 19(1)(b)).

I. The Decision of the Court of Appeals Does Violence to the Broad Purposes of the Act and Creates a Serious Gap in the Statutory Ban on Employment Discrimination.

A decision, such as that below, which permits newspapers to segregate "Help Wanted" advertisements on the basis of sex and to publish racially or sexually discriminatory advertisements is fundamentally inconsistent with the sweeping, pathbreaking legislation by which Congress meant to "eliminate . . . discrimination in employment."[6] As construed by the court below, nothing in the Civil Rights Act of 1964 prohibits a newspaper from printing sexually—or even racially—discriminatory "Help Wanted" advertisements.

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6. H.R. Rep. No. 914, 88th Cong., 1st Sess., at 5 (1963).

As the briefs *amicus curiae* of the United States Equal Employment Opportunity Commission and the NAACP Legal Defense Fund filed in the courts below demonstrate, many newspapers in this country routinely print racially discriminatory advertisements.[7] Discrimination based on sex is even more pervasive. Virtually all newspapers carry advertisements which explicitly or implicitly indicate a sexual preference or limitation which patently violates the proscriptions of Title VII. Moreover, many newspapers segregate "Help Wanted" advertisements by sex: "Help Wanted, Men" and "Help Wanted, Women".

The effect of these discriminatory advertisements is devastating. The traditional objects of job discrimination—racial minorities and women—are channeled away from from jobs for which they are qualified—and, more importantly, as to which they are entitled by law to be considered without regard to race or sex. The Commission, in its *amicus curiae* brief in the Court of Appeals, referred to a study of the effects of segregating "Help Wanted" ads on the basis of sex:

> When jobs were segregated and labeled on the basis of sex . . ., only 46% of the women in this study were as likely to apply for "male interest" jobs as for "female interest" jobs. . . . But . . . when these same jobs appeared in an integrated alphabetical listing with no reference to sex, fully 81% of the women preferred the "male interest" jobs to the "female interest" jobs.

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7. Thus, in a single issue, the New Orleans *Times-Picayune* offered a position for a "colored cooks helper" and a "Dental Assistant . . . white . . . ." Brief for the United States Equal Employment Opportunity Commission as Amicus Curiae, Appendix B (R.104-108) (filed in District Court); Brief for the NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae in Support of Plaintiff-Appellant, Appendix A (filed in Court of Appeals).

> For example, the job of newspaper reporter fell in popularity from 7th place when it appeared in the integrated listing to 19th place when it was segregated as a "male interest" job. It seems clear that the newspaper editor who wishes to hire only male reporters—in violation of the law—can place his ad in the "Male Interest" column, secure in the knowledge that this will effectively discourage female applicants.[8]

The decision of the court below opens a loop-hole in the statutory coverage of Title VII which could hardly have been intended by Congress. While Congress was willing to exempt from the coverage of the Act employers with fewer than fifteen employees,[9] employers so exempted may not utilize significant channels of commerce—the labor union or the employment agency—to effect discriminatory employment preferences which they are directly prohibited from utilizing.[10] By holding that newspapers regularly en-

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8. Testimony of Sandra L. Bem and Daryl J. Bem, Department of Psychology, Carnegie-Mellon University before the Pittsburgh Human Relations Commission, Feb. 1970, reprinted in Hearings Before the Special Subcommittee of Education of the Committee on Education & Labor, House of Representatives, 91st Cong., 2d Sess., on Section 805 of H.R. 16098, Part 2 (July 1 and 31, 1970).

9. Prior to March, 1972, the exemption was for employers with twenty-five (25) or fewer employees. The Congressional purpose of the exemption is not entirely clear. Presumably notions of *de minimus* and concerns as to the proper limits of federal regulation were the operative factors.

10. Section 703(b), 42 U.S.C. § 2000e-2(b), makes it unlawful for any "employment agency" to "fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin . . ." Construing a definitional section identical to Section 701(c) of the Act (42 U.S.C. § 2000e(c)) contained in the Age Discrimination in Employment Act, the Regulations promulgated thereunder provide: "As long as an employment agency regularly procures employees for at least one covered employer, it qualifies . . . as an employment agency with respect to all of its activities whether they be for covered or noncovered employers." Section 860.35(b), CCH Emp. Practices Guide ¶ 4770.36. *Cf.* Decision No. 71-1598, CCH EEOC Decisions ¶ 6271 (April 6, 1971).

aged in the publication of "Help Wanted" advertisements re not covered by Title VII, the Court of Appeals opened he way for employers not covered by Title VII to discrim-nate with relative ease. By explicitly indicating a racial or exual preference—or even by listing the job in a sexually egregated category—employers, acting through the medi-m of newspapers, may effectively deter applicants of the ndesired category from applying.

Moreover, even as to employers covered by the Act the ecision below greatly weakens the impact of Title VII. urely to no one's surprise, the Civil Rights Act of 1964 as not proved to be self-enforcing. Great economic and ractical considerations create powerful disincentives for ndividuals who believe they have been discriminated gainst to seek administrative or judicial relief. Thus, the roscriptions against discrimination by labor unions and mployment agencies—whose incentive to act responsibly nd to conform to the requirements of law is great—are e cutting edge of compliance. Most of the thousands of mployers who seek employees through the pages of Re-ondent's newspapers may never be involved in an unlaw-l employment practice proceeding before the EEOC; but e newspapers, if subjected to the strictures of Title VII, uld be powerful agents for securing compliance as a atter of routine.

The Decision of the Court of Appeals Is Plainly Incorrect.

A. *A Literal Reading of the Statute Requires Appli-tion of Title VII to Newspapers.* Section 701(c) of the t provides in material part:

> The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employ-er. . . .

The District Court stated that "the term 'employment agency' does not in common parlance suggest 'newspaper'." (R.157). But "common parlance" is not the controlling test: had Congress meant to incorporate "common parlance" into the Act, there would have been no need to include a definitional section (Section 701, 42 U.S.C. § 2000e) or, specifically, to define in *functional terms* the phrase "employment agency".[11]

The operations of Respondent are precisely those described by Section 701(c). Respondent "regularly"—that is, seven days a week, in two newspapers,[12] each of which has several editions—publishes classified advertisements which list both available jobs and persons seeking employment. Respondent also assists its customers in the preparation of advertisements (R.109-110, R.143-144), offers information with respect to the applicable laws on employment discrimination (R.100, 144), and provides a mailing service for advertisers wishing to remain anonymous. (R.110). The existence and efficacy of these classified advertisements are widely advertised and promoted by Respondent; in a very real sense, Respondent *competes* with the so-called "regular" employment agencies. By the publication of "Help Wanted" advertisements (not to mention "Job Wanted" advertisements), Respondent assists employers in finding employees and assists job seekers in finding positions. In this capacity, Respondent is plainly and simply "undertaking . . . to procure for employees opportunities to work

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11. For example, the definition of an "employment agency" explicitly includes those serving "without compensation"; presumably the "common parlance" view of an employment agency would not reach such persons.

12. Respondent publishes the classified advertisement sections of both the San Francisco *Chronicle* and *Examiner* and their combined Sunday edition. (R.2, 46).

for an employer," and is also "undertaking . . . to procure employees for an employer."[13]

In this respect, it is significant that the EEOC, whose opinion as the administrative agency charged with implementing Title VII is entitled to great weight (*e.g. Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971)), has taken the position that newspapers which publish "Help Wanted" advertisements are "employment agencies" within the meaning of Title VII.

B. *The Courts Below Erred In Attributing to Congress A Concern for the "Burden" Compliance With Title VII Would Impose Upon Newspapers.* The District Court reached its conclusion by proceeding from an erroneous premise. It reasoned that a newspaper would be compelled to "make its own judgment in each case concerning whether advertising copy . . . falls within the statutory provision permitting such a specification and preference [on the basis of religion, sex or national origin] *only* when such preference or specification 'is a bona fide occupational qualification for employment.'" (R.158-159). This information, the District Court stated, is "primarily and peculiarly within knowledge of the employer who presents" the advertisement, although it would "also be presumably within the knowledge of regular employment agencies." (R.159). "Interviewing and screening is not a usual activity of the ordinary newspaper . . . ," the Court added, "even though the newspaper may sometimes help some individual advertisers with suggestions about the wording and form of their ad." (R.160). Thus, it concluded, "Congress had

13. Indeed, it is an exaggeration to say that these services differ substantially from those provided by "regular" employment agencies. The services which such agencies render vary substantially; in many instances they do no more than provide an inquiring employee with the names of employers who have positions available and attempt to arrange appointments for an interview.

no intention of imposing upon newspapers the obligations imposed upon employers and ordinary 'employment agencies.'" (R.161).

This District Court erroneously proceeded to evaluate the intent of Congress and the scope of Title VII in light of problems it thought would arise in determining the existence or non-existence of a bona fide occupational qualification. But the central thrust and purpose of Title VII as originally drafted was to eradicate discrimination on grounds of *race* from the field of employment; and Congress provided no exemption—for a "bona fide occupational qualification" or otherwise—from its proscription of racial discrimination. Whatever problems there might be of "screening" to determine the possible presence of a bona fide occupational qualification, they simply do not exist where the discrimination is on the ground of race, and it was that category of discrimination with which Congress was initially and primarily concerned. Thus, when the provisions of Title VII were proposed and debated—when the very structure of the Act took shape (and the crucial definitions were first drafted)—Congress was not concerned with the theoretical administrative difficulties which persuaded the District Court that Congress could not have intended to bind newspapers to the anti-discrimination provisions of Title VII.[14]

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14. It is true that the proscription against discrimination on grounds of religion and national origin was in the original bill, and that an exception was provided where that represented a bona fide occupational qualification. But there can be no mistaking the fundamental and overriding concern of Congress to eliminate *racial* discrimination, for which no "bona fide occupational qualification" exemption was proposed. And, although there have been literally hundreds of cases brought under Title VII, there are almost no reported cases involving discrimination on the grounds of religion or national origin. See CCH *Employment Practices Guide* ¶¶ 1218, 1220. Advertisements referring to a religious or national origin limitation are a rare event. In the absence of the subsequently added prohibition against discrimination on account of sex, the task of "screening" would have been almost literally nonexistent.

The addition of a proscription of discrimination on account of sex—which has since acquired considerable significance as public policy—was in 1964 an act of almost malicious frivolity. It was added to the bill "only at the last moment" (*Phillips v. Martin Marietta Corporation*, 411 F.2d 1, 3 (5th Cir. 1969)) by Congressman Howard Smith of Virginia—a staunch opponent of the entire Civil Rights Act of 1964. See 110 Cong.Rec. 2577-2584, 2804 (1964). To say that this last-minute addition did not receive "much Congressional deliberation" (*Potlach Forests, Inc. v. Hays*, 318 F.Supp. 1368, 1375, 3 E.P.D. ¶ 8024 (E.D.Ark. 1970)) and that "any clear legislative history is absent" (*Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781, 783 (E.D.La. 1967)) is an understatement. Indeed, it was necessary for both the House and Senate to make corrective amendments to adjust for the inclusion of a ban on sex discrimination in Title VII. See 110 Cong.Rec. 2720-2721, 12819. But the basic structure of Title VII was conceived and had taken shape long before Congressman Smith's amendment was proposed and adopted, and, most importantly for present purposes, the definition of an "employment agency" was not altered in response to the inclusion of the ban on sex discrimination.

Viewed in this light, the District Court's analysis (which the Court of Appeals adopted) is stripped of its underpinnings. The literal language of Title VII plainly extends to the publication of classified employment advertisements and the other services which Respondent regularly offers its customers. (R.104-107).

Although the impact of the last-minute addition of the prohibition against sex discrimination does not affect the issue in this case—whether a newspaper is an "employment agency" bound by Title VII—the District Court's factual premise was also incorrect. The "burden" which the District

Court feared would be imposed upon newspapers if they were required to comply with the anti-discrimination provisions of Title VII is not a heavy one. In this regard, several factors are pertinent:

First, the vast majority of all jobs—and, specifically, of those jobs advertised in Respondent's classified pages—do *not* involve a bona fide occupational qualification. The exception for a bona fide occupational qualification "was intended to be narrowly construed" (*Weeks v. Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228, 232 (5th Cir. 1969)); the burden of proof is on the employer (*id.;* see also, *Cheatwood v. South Central Bell Telephone & Telegraph Co.,* 303 F.Supp. 754 (M.D.Ala. 1969); EEOC Decision No. 70-478 (Jan. 21, 1970), CCH *Employment Practices Guide,* ¶ 6115); and the governing standard is whether the employer has "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved" (*Weeks v. Southern Bell Telephone & Telegraph Co., supra,* at 235). Petitioner presented undisputed evidence in the District Court that of the advertisements published by Respondent on November 2, 1969, 92% of those in "Help Wanted, Women" and 90% of those in "Help Wanted, Male" categories did not require sex as a bona fide occupational qualification. (R.62).[15] Since in the vast majority of cases no bona fide occupational qualification exists, extensive screening would not be required if Respondent seriously endeavored to cause advertisers to refrain from publishing advertisements which involve discriminations in violation of Title VII standards.

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15. The above is set forth in the Affidavit of Jean Wright, whose credentials as an expert in the field of employment, including analysis of occupations and employment statistics, are set forth at R.61 and were unchallenged; similarly, her conclusions were not disputed.

Second, there is plainly no burden whatsoever in compelling newspapers to abandon the *segregation* of classified advertisements on the basis of sex. Even if it were permissible for newspapers to allow employers claiming that the job did indeed involve a bona fide occupational qualification to refer to sex in the listing, there is no justification for permitting a newspaper to maintain separate listings for jobs available to males and jobs available to females.

Third, to the extent that there might exist a genuine burden which would unfairly be placed on newspaper publishers, the Act is plainly able to accommodate and adjust to the special circumstances of their operations. The Commission's own rules are ample authority for asserting that a newspaper will not be bound to the exacting standards to which an employer, for example, must adhere. The Commission has already indicated in its *Guidelines on Discrimination Because of Sex* (29 C.F.R. § 1604) a flexible approach toward the duties of a "regular" employment agency:

> "An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. *However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupations qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order.*" (29 C.F.R. § 1604.5(b), 37 Fed. Reg. 6837, § 1604.6(b) (April 5, 1972), emphasis added.)

All of this suggests the kind of flexibility and reasonableness which makes possible an accommodation between the purposes of Title VII and the legitimate interests of newspapers.[16]

C. *The Legislative History Is Inconclusive and Does Not Require Exemption of Newspapers From the Provisions of Title VII.* Given both the language of the Act and the obvious harmony between its broad remedial purposes and the inclusion of newspapers within the prohibition against discrimination in the employment market, it would take clear and convincing evidence of a specific legislative intent to warrant the exemption granted by the courts below. That evidence, as the Court of Appeals conceded, simply does not exist. As its brief opinion acknowledged, "the legislative history contributes little."

Respondent relied in the courts below upon two scraps in the voluminous record which constitutes the legislative history of the Civil Rights Act of 1964. But these terse and fragmentary passages are more than inconclusive; they are not even directed to the provisions of the Act upon which Petitioner here relies.[17]

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16. For example, it seems to us not inconsistent with the Act as it has been administered and interpreted by the Commission and the courts to suggest that a newspaper would not be in violation of Section 703(b), 42 U.S.C. § 2000e-2(b), if it publishes, in good faith, an advertisement containing a limitation as to sex after receiving a statement from the advertiser that the advertiser believes that the job entails a bona fide occupational qualification, even though it might subsequently be determined that in fact no bona fide occupational qualification existed as to that job. *Cf.* 29 C.F.R. § 1604(c)(2), quoted above.

17. The two fragmentary passages in the legislative history upon which Respondent relies each deal with Section 704(b), 42 U.S.C. § 2000e-3(b), which makes it an unlawful employment practice "to print . . . any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin." The first is a single sentence in the Report of the House Committee on the Judiciary (H.R.Rep. No. 914, 88th Cong., 1st

CONCLUSION

With the adoption of Title VII, Congress legislated broadly against invidious discrimination in the job market in all phases of recruitment, employment and union membership. Its proscription of employment discrimination by

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Sess., 2 U.S. Code Congr. & Admin.News 2403 (1964), in reference to the provisions of what is now Section 704(b):

> The prohibitions of this section do not require newspapers and other publications to exercise any control or supervision over, or to do any screening of, the advertisements and notices published by them.

The second is a brief passage in the lengthy "Interpretative Memorandum" prepared by Senators Clark and Case, also in reference to Section 704(b):

> Section 705(b) [since renumbered as Section 704(b)] prohibits discriminatory advertising by employers, employment agencies and labor organizations . . . . It should be noted that the prohibition does not extend to the newspaper or other publication printing the advertisement. It runs solely to the sponsoring firm or organization. (110 Cong.Record 7213 (1964)).

Neither item of legislative history is addressed to the definition in Section 701(c), 42 U.S.C. § 2000e(c), of an "employment agency", which is the sole issue in this case. Moreover, Petitioner's claims are fundamentally premised upon Section 703(b), which makes it an unlawful employment practice for an "employment agency to fail or refuse to refer for employment, or otherwise discriminate against, any individual because of his race, color, religion, sex, or national origin, *or to classify* . . . any individual on the basis of his race, color, religion, sex, or national origin." In any event, these snippets of legislative history are, as the Court of Appeals candidly acknowledged, inconclusive.

Even if Respondent's fragments of legislative history were entitled to any weight, the statement that newspapers will not be required to exercise a "screening" function can hardly be thought to exempt newspapers from the prohibitation against affirmative discriminatory acts—e.g., the provisions of Section 703(b) making it unlawful "to classify . . . any individual on the basis of race, color, religion, sex, or national origin". Petitioner, in demanding that Respondent cease its practice of listing "help wanted" jobs in separate sections by sex, is not asking that Respondent exercise any screening function.

Nor is there any measurable burden imposed where an advertisement sought to be placed is discriminatory on its face—as where the advertisement carries a racial preference or limitation; plainly no degree of judgment is required, for all racial classifications are

reason of race, color, religion, sex or national origin reflects "a policy which Congress considered of the highest priority." *Bowe v. Colgate-Palmolive Company*, 416 F.2d 711, 720 (5th Cir. 1968), quoting from *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968). The Court of Appeals for the Fifth Circuit has well summarized the compelling need which Title VII was meant to serve:

> Racial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not just with individuals sharing in the 'outer benefits' of being an American citizen but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses.[18]

In recognition of the central role which Title VII was designed to play in ridding the American economic system of the harmful effects of invidious discrimination in employment, it has been fairly observed that "it is . . . the duty of the courts to make sure that the Act works, and [that] the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics." *Culpepper v. Reynolds Metals Company, supra,*

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proscribed. And where the newspaper knows or reasonably should know that a sex preference or limitation is unlawful—a "help wanted" listing for a retail salesperson, for example—no significant screening is required. The very most that can be said of this legislative history—even if thought applicable to sections other than Section 704(b)—is that Congress did not think newspapers should be required to make affirmative efforts to investigate and determine that limitations in an advertisement are lawful. As shown at pp. 14-16, *supra*, that objective can be satisfied without exempting newspapers from the provisions of Title VII altogether.

18. *Culpepper v. Reynolds Metals Company*, 421 F.2d 888, 891 (5th Cir. 1970); see also *Bowe v. Colgate-Palmolive Company*, 416 F.2d 711 (7th Cir. 1969); *Oatis v. Crown Zellerbach*, 398 F.2d 496 (5th Cir. 1968). The ban on sex discrimination reflects an equally fundamental policy. *See, e.g., Weeks v. Southern Bell Telephone & Telegraph Company*, 408 F.2d 228 (5th Cir. 1969).

at 894. With all respect, the decision of the Court of Appeals is fundamentally at odds with these principles. It severely hampers the effective implementation of Title VII by permitting a major—indeed, in many communities and for many occupations, *the* most significant—link between potential employees and employers to discriminate on the basis of race and sex unrestrained by the otherwise sweeping provisions of Title VII.

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Dated: December 14, 1972.

Respectfully submitted,

JEROME B. FALK, JR.
HOWARD, PRIM, RICE, NEMEROVSKI,
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Attorneys for Petitioner

(Appendices follow)

APPENDIX A

United States Court of Appeals
For the Ninth Circuit

BRENDA BRUSH,

Plaintiff-Appellant,

vs.

SAN FRANCISCO NEWSPAPER PRINTING COMPANY,

Defendant-Appellee.

No. 26,666

[September 19, 1972]

Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS and CARTER, Circuit Judges, and McNICHOLS,* District Judge.

PER CURIAM:

The judgment of the district court against Brush is affirmed.

The object of the complaint was to stop the San Francisco Chronicle and the San Francisco Examiner (published by the San Francisco Newspaper Printing Company) from using in employment ads classifications of male and female.

To rule with plaintiff-appellant would require the district court and us to find that the defendant, when it publishes help wanted ads, is an employment agency. Neither the dictionary nor the legislative history supports this construction. The legislative history contributes little.

We are in substantial agreement with the district court's opinion. Brush v. San Francisco Newspaper Printing Company, 315 F. Supp. 577 (1970).

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*The Honorable Ray McNichols, United States District Judge for the District of Idaho, sitting by designation.

APPENDIX B

Brenda BRUSH, Plaintiff,

v.

SAN FRANCISCO NEWSPAPER PRINTING COMPANY,

Defendant.

No. C-70 102.

United States District Court,

N. D. California.

June 12, 1970.

SWEIGERT, District Judge.

This is a suit brought under the Civil Rights Act of 1964, Title 42 U.S.C. §§ 2000e to 2000e-15 by plaintiff, a woman in the market for employment in the San Francisco Bay Area, against defendant newspaper printer and publisher of the daily San Francisco Chronicle, the daily San Francisco Examiner and the Sunday Chronicle-Examiner, seeking a declaratory judgment and an injunction enjoining defendant from listing employment advertisements in its classified advertising sections under separate "Men" and "Women" headings when sex is not a bona fide occupational qualification and requiring defendant to provide listings without "Men" and "Women" headings where sex is not a bona fide occupational qualification.

THE RECORD

The case is now before the court on plaintiff's application for a preliminary injunction based upon the complaint and an evidentiary record consisting of plaintiff's affidavit of March 30, 1970, and an affidavit of Wright filed April 2, 1970. Defendant's evidentiary record in opposition consists of an affidavit of McLain filed May 21, 1970.

The complaint alleges (Par. VI) that defendant publishes "Help Wanted" listings under separate "Men" and "Women" headings without reference to whether sex is a bona fide occupational qualification.

However, by stipulation filed March 13, 1970, it is agreed that, so far as "Help Wanted" advertisements are concerned, defendant provides three listings (a) Help Wanted, Women; (b) Help Wanted, Men, and (c) a third neutral listing, Wanted, Men, Women; that the decision as to these listings is the advertiser's and that defendant places the "Help Wanted" ads under the listing designated by the advertiser.

In her affidavit of March 30, 1970, plaintiff sets forth that her occupation has been in the area of "research and planning in the field of human resources;" that this occupation is one in which sex is not a bona fide occupational qualification; that in November, 1969, she was unemployed and seeking employment and in order to secure a position consulted the advertising sections of the daily San Francisco Chronicle, the San Francisco Examiner and the Sunday Chronicle-Examiner; that in surveying the advertisements listed in the "Help Wanted" section, many jobs which interested her, were listed under the heading "Help Wanted—Men" although sex was not a bona fide occupational qualification for such jobs; that she was effectively discouraged from making application due to the inference created by the advertisement that the employer did not want to hire a woman; that this was particularly true when the advertisement called for a telephone response; that as a result of being discouraged she did not answer such advertisements, but would have done so had they been listed without a preference for men.

The complaint also (Par. VII) alleges that defendant publishes "Job Wanted" listings under separate "Men" and

"Women" headings without providing a separate designated heading where there can be listed jobs in which sex is not a bona fide occupational qualification.

So far as "Job Wanted" advertisements are concerned plaintiff's affidavit of March 30, 1970 sets forth that she requested defendant to place a "Job Wanted" ad under a listing without sex heading, since her occupation did not involve sex as a bona fide occupational qualification, but was told that "Jobs Wanted" could only be listed under either male or female headings with the suggestion, however, that she "list under both headings" at double expense.

However, the parties have since stipulated on the record in open court that defendant will henceforth, when requested to do so by an advertiser placing a "Job Wanted" advertisement, make available to the advertiser a neutral column heading which contains no reference to either male or female.[1]

THE STATUTE INVOLVED

Title 42 U.S.C. § 2000e-3(b) provides that "it shall be an unlawful employment practice for an employer, labor organization or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization or relating to any classification or referral for employment by such an employment agency,

1. This stipulation has been entered into by defendant with the express reservation that it is made without acknowledging any misconduct or unlawful employment practices by reason of past conduct and without retreating from its position that the provisions of the Civil Rights Act of 1964, relating to employment agencies, do not extend to defendant's activities in the printing and circulation of classified employment want ads in newspapers and expressly reserving its position that it does not by reason of those activities fall within the above provisions of the Act.

indicating any preference, limitation, specification or discrimination based on race, color, religion, *sex* or national origin *except* that such a notice or advertisement may indicate a preference, limitation, specification or discrimination based on religion, sex or national origin *when* religion, sex or national origin is a bona fide occupational qualification for employment." (emphasis added).

Section 2000e-2(b) provides: "It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex or national origin."[2]

Section 2000e(c) defines the term "employment agency" as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer • • •."

THE ISSUE

The issue in this case is not whether Congress *could* have included newspapers within the civil rights scheme of the

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2. Section 2000e-2(e) contains an exception similar to that in Section 2000e-3(b) to the effect that notwithstanding any other provision of the Act, "it shall not be unlawful for an employer to hire and employ employees or for an employment agency to classify on the basis of religion, sex or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that business or enterprise."

It will be noted that the exception set forth in § 2000e-2(e) and 2000e-3(b) applies only to preferences and specifications based on religion, sex or national origin and does not apply to preferences or specifications based on race or color. As to the latter, the prohibitions of the Act are absolute and all persons, including newspapers, presumably have notice of that absolute prohibition. It is only where the preference or specification is based on religion, sex or national origin that the exception, involving a judgment as to whether such preference or specification is a bona fide occupational qualification for the employment, applies.

statute along with employers, employment agencies and labor unions. Nor, is the issue whether Congress *should* have included newspapers in order to make the legislation more effective (as plaintiff argues it would) by extending its scope and aiding in its enforcement. Rather, the only question before this court is whether Congress *did* include newspapers.[3]

Certainly, the term "employment agency" does not in common parlance suggest "newspaper." Plaintiffs contend, however, that Congress, nevertheless, so broadly defined "employment agency" in this statute as to include newspapers, arguing that newspapers, like employment agencies, do regularly undertake "to procure employees for an employer or to procure for employees opportunities to work for an employer."

[1] However, the statutory requirement that an employment agency be one that "regularly" undertakes to procure employees or employment opportunities indicates that the Congress had in mind to include only those engaged to a significant degree in that kind of activity *as their profession or business.*

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3. Defendant also contends that plaintiff has not complied with statutory prerequisites for presenting to this court her grievance concerning the "Job Wanted" classification, pointing out that she failed to present that issue to the Equal Employment Opportunities Commission prior to this suit as required by 42 U.S.C. § 2000e-5. It is true that the complaint herein alleges only that plaintiff's grievance filed prior to this suit with the Equal Employees Opportunities Commission referred only to the "Help Wanted" matter, and that a "Right to Sue" letter referring to that charge was received from the Commission. However, plaintiff's affidavit of March 30, 1970 is to the effect that she had in fact filed two grievances with the Commission prior to this suit, one concerning the "Help Wanted" matter and another concerning the "Job Wanted" matter; that she was unaware that the Commission's "Right to Sue" letter referred only to the "Help Wanted" matter; that subsequent to the filing of the complaint she received a second "Right to Sue" letter from the Commission permitting suit on the "Job Wanted" matter.

[2] Newspapers, although in the business of printing and publishing advertising copy presented by employers, professional employment agencies and job seekers, are not in any other or ordinary sense engaged in the business of procuring employees or employment opportunities—any more than they are engaged in the used car business or in the real estate business when they accept and print advertising copy designed to bring buyers and sellers together in those fields.

If the definition here in question is construed to include newspapers, then it would follow that a newspaper is subject to all the prohibitions and penalties expressly imposed by the statute on employers and on ordinary employment agencies.

One of these prohibitions is that it would be "an unlawful employment practice" for the newspaper "to print or publish or cause to be printed or published any notice or advertisement relating to employment • • • indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex or national origin *except* that such a notice or advertisement may indicate a preference, limitation, or specification, or discrimination based on religion, sex or national origin *when* religion, sex or national origin is a bona fide occupational qualification for employment." (emphasis added).

In short, the newspaper would have to make its own judgment in each case concerning whether advertising copy presented to it by an employer, or by a regular employment agency, and indicating a preference or specification based on sex, falls within the statutory provision permitting such a specification and preference *only* when such preference or specification "is a bona fide occupational qualification for employment."

The factual information pertinent to a judgment whether sex is really an "occupational qualification" for any particular employment and, if so, whether such occupational qualification is asserted in "good faith," is primarily and peculiarly within knowledge of the employer who presents "Help Wanted" advertising copy.

Such information would also be presumably within the knowledge of regular employment agencies which make it their special business to interview employers or persons seeking their professional services and thus to obtain detailed background information pertinent to whether sex is really a good faith occupational qualification for any particular job or any particular business.

But, such information is not ordinarily within the knowledge of the newspaper to which the employer or the employment agency presents the advertising copy—ordinarily over a desk or by mail. Nor does the pertinent background information necessarily appear on the face of the advertising copy presented to the newspaper.

When an employer or an ordinary employment agency places ad copy indicating a preference or specification as to sex concerning a generally described job or business, it may have a basis in fact for the preferral or specification even though such factual basis does not appear in the copy itself.

It is stipulated in this case that defendant newspaper does not undertake or attempt to determine whether a "Help Wanted—Men" or a "Help Wanted—Women" ad should appear under some other available listing, nor, in particular, does the newspaper undertake or attempt to ascertain from the advertiser, or otherwise to determine, whether the sex under which listing the advertisement is placed is a "bona fide occupational qualification for the position advertised." (Stipulation of March 13, 1970).

Yet, according to plaintiff, defendant newspaper henceforth must make this decision from the face of the copy, itself, or, exercising due diligence in the matter, must in some way attempt to obtain the pertinent, detailed information or description concerning each particular job, through interviews with the employer or the employment agency, or, if unable to satisfy itself in that manner, must refuse to publish the ad.

Certainly such interviewing and screening is not a usual activity of the ordinary newspaper—as it is the business of an employer or a professional employment agency—even though the newspaper may sometimes help some individual advertisers with suggestions about the wording and form of their ad.

Yet, if plaintiffs are correct in their contention that the term advertising agency includes newspapers, the latter must henceforth make the necessary personnel and procedural arrangements to control, supervise, screen and otherwise investigate each advertisement published by them in order to meet the newspaper's responsibility under the statute—the very matters which, according to the legislative history of Section 2000e-3(b), were *not* intended by the Congress.

The House Judiciary Committee Report on the Civil Rights Act of 1964, 2 U.S.Code Cong. & Adm.News (1964) p. 2403, commenting on this Section 2000e-3(b), states: "The prohibitions of this section do not require newspapers and other publications to exercise any control or supervision over, or to do any screening of the advertisements or notices published by them."

This indicates quite clearly, we believe, that the Congress had no intention of imposing upon newspapers the obligations imposed upon employers and ordinary "employment agencies."

Also, at 110 Cong.Rec. 7213, April 4, 1964, appears an "Interpretative Memorandum" prepared by Senators Clark and Case, Senate floor managers of the Civil Rights Act. Referring to this Section 2000e-3(b) the memorandum states that the section "prohibits discriminatory advertising by employers, employment agencies and labor organizations * * *. It should be noted that the prohibition does not extend to the newspaper or other publications printing the advertisement. It runs solely to the sponsoring firm or organization."

Fully aware of the caution with which legislative history may be considered as indicating an exception to the provisions of public interest legislation (NLRB v. Fruit and Vegetable Packers etc., Local 760, 377 U.S. 58, 84 S.Ct. 1063, 12 L. Ed.2d 129 (1963); United States v. Oregon, 366 U.S. 643, 81 S.Ct. 1278, 6 L. Ed.2d 575 (1961)), we are convinced that the legislative history in the pending case shows that the term "employment agency" was used in its ordinary sense rather than in such a broad sense as would include newspapers.

The General Counsel of the Equal Employment Opportunities Commission who now appears as Amicus Curiae in support of plaintiff's claim that "employment agency" includes newspapers, expressed quite the opposite opinion in an Opinion Letter (GC-159-65) of October 1, 1965, conceding at that time that: "A newspaper is *not* an employment agency within the meaning of Section 701(c)," (Sec. 2000e-3(b). (emphasis added).

Notwithstanding this legislative history, plaintiffs, arguing the probability that Congress intended to include newspapers, point out that laws often require newspapers to screen and make judgments concerning the content of their published material, e.g., false advertising in general (Cal.B. & P.Code, Sec. 17500); misleading advertisements re com-

mission salesmen (Cal.Labor Code, Sec. 976); false real estate advertising (B. & P.Code, Sec. 11022).[4]

It will be noted, however, that each of these statutes, dealing with false or misleading advertising and broadly applicable to all "persons," expressly exclude newspapers from their application *unless* it be shown that the newspaper acts in bad faith and with knowledge of the falsity of the advertisements.

The Civil Rights Act sections now under scrutiny are not made broadly applicable to all "persons," but only to "employer," "employment agencies" and "labor unions." Since the statute is neither made specifically applicable to newspapers nor made so broadly applicable as to include newspapers, there was no reason for any express exclusion, qualified or otherwise, of newspapers. Indeed, in our opinion, the absence of any such exclusion is persuasive that Congress never contemplated a claim that newspapers were included. For, if it had so contemplated, it would in all probability have added at least a qualified exclusion of newspapers similar to the exclusion clauses commonly used in the advertising statutes above cited.

We find no such exclusionary clause in the statute. The only provision in the statute is Section 2000e-5(g) to the effect that at the civil action stage of any grievance proceeding the court, before granting relief, must find that any unlawful employment practice of the respondent was "intentional."

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4. Plaintiffs also cite such statutes as: Advertising re miscarriage or abortion (Cal.B. & P.Code, Sec. 601) and obscenity statutes (Cal.Penal Code Sec. 313), both of which are quite different from other advertising statutes in that, in addition to being broadly applicable to newspapers, they concern subject matter which can be determined from the face of the ad itself without reference to knowledge of other pertinent matter; also the libel laws (Cal.Civil Code, §§ 44-48a) which are different in that they are made broadly applicable to newspapers and further, even in that application contain special qualifications as to newspapers (e.g., Sec. 48a).

Another provision appears, not in the statute, but in certain Commission "Guidelines on Discrimination Because of Sex." Par. 1604.1-1604.7, especially 1604.6(b). This administrative provision, after setting forth a long series of guidelines concerning the problem whether sex is a bona fide occupational qualification for a job or business, relaxes the statute a bit insofar as it applies to "employment agencies" (vis a vis employers). It provides that "An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the other knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupation qualification is without substance *and* the agency makes and maintains a written record available to the Commission of each job order. *Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification. It is the responsibility of employment agencies to keep informed of opinions and decisions of the Commission on sex discrimination.*" (emphasis added).

It will be noted that the limited exclusion granted to "employment agencies" is conditioned upon their maintaining certain kinds of records containing certain kinds of information concerning "sex as a bona fide occupational qualification," e.g., keeping data re "description of the job" and data re "the basis for the employer's claim of bona fide occupational qualification."

That kind of record keeping, along with the personnel and procedural arrangements which it entails, is appropri-

ate for regular, professional advertising agencies but it is not ordinarily maintained by nor is it ordinarily expected of a newspaper.

Entirely apart from the legislative history above set forth, this limited exclusion, conditioned as it is on such a record keeping function, persuades us that neither the Congress nor the Commission had newspapers in mind when using the term "employment agency."

Certainly, if the Congress intended to impose on newspapers, not only new responsibilities but also new personnel and procedural activities, it could have and in our opinion would have specified newspapers along with employers, labor unions and employment agencies. It not only did not do so, it clearly expressed its contrary intent in the legislative history leading to the passage of the legislation.

If, as plaintiff argues, the legislation would be improved by inclusion of newspapers, such inclusion must be accomplished by the Congress—not by the courts.

For the foregoing reasons plaintiff's application for a preliminary injunction is denied and the suit is dismissed for failure of the complaint to state a claim.